No. 14609

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

S. D. HAHN, as Administrator of the Estate of Young D. Hahn, Deceased,

Appellant,

vs.

SARAH E. PADRE, as Administratrix of the Estate of Herbert Huxley Hahn, Deceased,

Appellee.

APPELLEE'S REPLY BRIEF.

TEMPLETON & MILLER,
811 West Seventh Street,
Los Angeles 17, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

RULES

STATUTE

TEXTBOOK

No. 14609

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

S. D. HAHN, as Administrator of the Estate of Young D. Hahn, Deceased,

Appellant,

vs.

SARAH E. PADRE, as Administratrix of the Estate of Herbert Huxley Hahn, Deceased,

Appellee.

APPELLEE'S REPLY BRIEF.

Preliminary Statement of Facts and Issues.

The Pleadings.

The statement of the Pleadings on pages 1 and 2 of Appellant's Opening Brief are correct in what they state. The Appellee Will supplement the statement by supplying the dates upon which the Cross-Complaints in Interpleader and Answers thereto were filed.

Appellant's Cross-Complaint was filed on December 29, 1953 [R. p. 9], and the Appellee's Answer thereto was filed January 7, 1954. [R. p. 12.] Appellee's Cross-Complaint was filed on January 7, 1954 [R. p. 17], and Appellant's Answer thereto was filed January 13, 1954. [R. p. 19.]

The Facts.

The first paragraph on page 3 of the Opening Brief adequately describes that portion of the facts which it purports to cover. However, the Appellee offers the following corrections to the balance of Appellant's Statement of Facts and will supplement and add to the facts later in this Reply Brief, particularly in showing that the Finding of Fact, that Herbert Huxley Hahn survived Young D. Hahn, is supported by the evidence.

Corrections to Appellant's Statement of Facts.

(1) The name of Appellee's witness, referred to on page 5 of the Opening Brief as "Cruevas," should be corrected to read "Cuevas."

(2) Appellant states on page 6 of his Brief that Cuevas testified: "* * * 'one local officer' arrived on the scene * * *." Relating to the same event, Cuevas testified by indicating there was more than one such officer. He referred to them as "policemen" [R. p. 81] and as "They" —"They went to the hospital right away." [R. p. 83.]

(3) On page 7, Appellant cites four instances wherein witness Thomas testified to the time of her arrival at the scene of the accident, apparently to show inconsistency on her part. Appellee will add: in the first three instances cited, the witness indicated "about" the particular time stated; and in the fourth, she stated "around" the certain hour.

Appellee also directs the Court's attention to the misspelling of witness Thomas' name in the Reporter's Transcript. She is referred to therein as "Thompson." No person named Thompson appeared in this cause as a witness or otherwise.

Since the Appellant's argument involves the diligence of the Appellee in preparing her case, the time element is important in arguing such a point. This brief log of the pertinent events in the history of the case will present a graphic account of the events:

By the Court.	By the Parties.
Dec. 2, 1953 Notice of Entry of Judgment in Interpleader. Judgment for the insurance company, had been docketed and entered November 30th.	
Dec. 29, 1953 Court on its own motion ordered pre-trial hearing set for January 11, 1954.	Dec. 29, 1953 Appellant filed Cross-Complaint in Interpleader. [R. p. 9.]
	Jan. 7, 1954 Appellee filed Answer to Cross-Complaint in Interpleader [R. p. 11] and Appellee filed Cross-Complaint. [R. p. 17.]
Jan. 11, 1954 Pre-trial hearing held. Set Trial for February 8th.	Jan. 11, 1954 Appellee offered into evidence the Autopsy Reports and Death Certificates. [Padre Exs. B and C.]
	Jan. 13, 1954 Appellant filed Answer to Appellee's Cross-Complaint. [R. p. 19.]

By the Court.	By the Parties.
Feb. 8, 1954 Trial held; continued to March 1, on Court's motion.	
	Feb. 17, 1954 Appellee first learned name of her witness, Cuevas. [R. p. 24.]
	Feb. 22, 1954 Appellee first learned of "a woman" who had ridden with Cuevas to scene of accident. She was not at her home address. [R. p. 25.]
	Feb. 24, 1954 Appellee filed Notice of Motion for Order Continuing Date of Hearing.
Feb. 25, 1954 Court granted motion, continuing trial to March 15th.	
	Mar. 4, 1954 Deposition taken of Appellee's witness, Dr. Arevalo. [R. p. 137.] Deposition taken of Appellee's witness, Officer Perez. [R. p. 159.]
	Mar. 14, 1954 Appellee's witness, Cuevas, told Appellee's attorney

By the Court.	By the Parties.
	that the "woman" previously referred to by Cuevas on February 22nd was named Ernestine and was living somewhere in the San Diego area. [R. p. 26.]
Mar. 15, 1954 Trial was held. [R. p. 160.]	
	Mar. 17, 1954 Attorney for Appellee engaged persons in San Diego to search for "Ernestine" (Thomas), the "woman." [R. p. 26.]
	Mar. 19, 1954 The "woman," Ernestine Thomas, was located in San Ysidro, California. [R. p. 26.]
	Mar. 21, 1954 Affidavit of Thomas obtained to accompany Appellee's Motion to Reopen case. [R. p. 27.]
Mar. 26, 1954 Appellee filed Notice of Motion for Order Reopening Case for Additional Evidence or for a New Trial. [R. p. 29.]	

By the Court.	By the Parties.
Apr. 5, 1954 Motion to Reopen granted.	
	May 8, 1955 Deposition of Ernestine Thomas taken. [Padre Ex. G.]
Aug. 16, 1954 Trial; Findings—Herbert Hahn survived Y. D. Hahn. [R. p. 29.]	
Aug. 30, 1954 Findings, Conclusion and Judgment filed and entered. [R. pp. 29, 33.]	

At the time of the Pre-trial Hearing on January 11, 1954, the issues to result from Appellee's Cross-Complaint were not established because the Answer of the Appellant had not yet been filed. During the Pre-trial Hearing the Appellee submitted the certified copy of the Autopsy Report of Dr. Arevalo and the Court announced that it would rule upon its admission as evidence and notify the Appellee of its ruling. [R. pp. 21, 43, 45.] The Court did not announce its ruling that it was inadmissible until the session of the trial on February 8, 1954, although Appellee learned from the Clerk of the Court on February 5th what the probable ruling would be. [R. p. 40.] Since it was clear at the time of the trial that Appellee had not learned of the ruling in time to procure other evidence, especially of eye witnesses at the scene of the accident, the Court on its own motion granted a continuance of the trial until March 1st, on the ground of public interest and jus-

tice. [R. pp. 45, 65.] At the February 8th session the counsel for Appellee stated that he believed the date of March 1st would not allow him time to procure such evidence in view of its being difficult for him to obtain evidence in Mexico. [R. p. 66.] A week before the March 1st setting, counsel for Appellee filed a motion to continue the trial to March 15th and his affidavit accounted for his acts to procure evidence which he had found in Mexico prior to February 24th and the necessity for such extension. [R. pp. 19-23.]

At the February 8th session the Court was not clear on the California law applicable, and had the opinion that a presumption of death was involved in determining the recipient of the insurance policies which were the subject of the Interpleader action. Since the Simultaneous Death Statute, Section 296.3 of the Probate Code, had superseded the Rule of a presumption, the Court had no clear view of the matter before the Court up to that point, and what might be required in the way of evidence. [R. p. 39.]

The affidavit of counsel for Appellee shows that he first learned on February 22nd that there had been "a woman" with witness Cuevas at the scene of the accident. It was later learned that she was married to someone whose first or surname was "Thomas." Counsel began search for the woman immediately and it was not until March 19th that an investigator for Appellee located her. Counsel returned to San Diego County and obtained her Ernestine Thomas affidavit on March 21st. [R. pp. 25-29.]

Issues Raised by the Appellant in Specification I.

As stated by Appellant:

1. Under the peculiar circumstances of this case the District Court abused its discretion in granting continuances and in re-opening the case for taking of additional evidence. (Substantially as stated by Appellant, Op. Br. p. 8.)

2. The Findings are contrary to the evidence. There was not sufficient evidence produced by Appellee, within the meaning of Section 296.3 of the Probate Code of California, to support the proposition that Young D. Hahn and Herbert Huxley Hahn died otherwise than simultaneously.

The Appellant's Specification of Errors conform to the above issues.

In arguing the issues of the abuse of discretion by the trial court, Appellant also raises the following issues although they are not segregated and set out as such in the Opening Brief:

A. The diligence or the lack of the same by Appellee in procuring evidence for the trial of February 8, 1954. (App. p. 11.)

B. The propriety or lack of the same of the Court's own motion to continue the trial to March 1, 1954, at the February 8th session. (App. p. 12.)

C. The diligence or lack of the same of Appellee in procuring the evidence which was the basis of Appellee's motion to continue the March 1st trial date to March 15th. (App. pp. 12, 13.)

D. Whether or not the Appellee was diligent in procuring witness Thomas, upon whose anticipated testimony

the Court re-opened the case by order of April 5, 1954. (App. p. 14.)

E. Whether the affidavits relating to Ernestine Thomas anticipated testimony were or were not sufficient to order re-opening of the case. (App. pp. 16, 18.)

F. Whether or not the Appellee had gambled on the results of the trial of March 15th before attempting to present the deposition of witness Thomas, after that trial. (App. p. 14.)

G. Whether or not Appellant was prejudiced or his cause injured because the trial was conducted at more than one session. (App. pp. 15, 19, 20.)

The Following Propositions and Contentions Will Be Advanced by the Appellee in Arguing on the Above Issues.

As to the first issue stated by the Appellant, the record shows no facts upon which to base the conclusion that the trial court abused its discretion in granting the two continuances and in re-opening the case.

As to the issues designated A through G.:

(1) The record does not show that any detailed statement of the action taken and the problems encountered by Appellee to procure evidence in the period, preceding the trial date of February 8th, was ever required or ever given by the Appellee, except in the instance of Dr. Arevalo.

(2) The trial court had the power to grant the continuance on its own motion at the trial of February 8th on the ground of public interest and justice, where Appellee did not learn the Court's ruling that the certified copies of the autopsy report would be inadmissible until immediately before the trial, through no fault of the Appellee.

(3) The affidavits of Appellee's counsel supporting the motions to continue the case to March 15th and to reopen the case contained sufficient facts to justify the granting of the respective motions and they were timely.

(4) The affidavit of Appellee's counsel recited the steps and delays encountered to obtain the testimony of witnesses in making the motion for continuance until March 15th. The affidavit of the counsel also stated in detail the steps taken in locating witness Thomas, showing that it was newly discovered evidence since the trial and the affidavit of Thomas showed that the witness could establish the time of death of Herbert Huxley Hahn, which had not been ascertained at the trial and her affidavit also corroborated the testimony of witness, Cuevas, for Appellee, who had testified on matters at the scene of the accident. The effect of both affidavits being sufficient to qualify her expected testimony as additional evidence at a re-opened case and also for a new trial if the same were to be granted.

(5) The record does not show that the two continuances or the re-opening of the case prevented Appellant from recalling any of his witnesses or other witnesses for rebuttal or any other purpose at any sessions of the trial. Nor does the record show the Appellant received an unfair trial or suffered any prejudice in the conduct of the case. The newly discovered evidence received on August 16th merely tipped the weight of the evidence in favor of the Appellee as something added later to objects already established in balance.

ARGUMENT OF THE CASE.

Appellee contends that no errors were committed by the District Court in neither Specification I nor Specification II as specified by Appellant, and each specification should be rejected.

Specification I: The Continuance Granted February 8, 1954.

At the trial of that date, the Court on its own motion continued the case to March 1st. Previous to the trial, the parties appeared at a Pre-trial Hearing on January 11th and at that time the Court inquired if counsel had any documents to be presented in evidence. Counsel for Appellee submitted certified copies of the Autopsy Reports for Y. D. Hahn and Herbert Huxley Hahn, who had died as the result of an automobile accident in Mexico. Certified copies of the Certificates of Death for the decedents were also submitted. It was understood at that time that the Court would rule on the admissibility of the documents in time to allow Appellee to procure other evidence in the event the documents were not to be admitted. [R. p. 21.] At the February 8th trial, the Autopsy Reports were ruled inadmissible. [R. p. 39.] The Court stated that the late ruling placed the Appellee at disadvantage and therefore the Court would continue the case in the interest of justice and to avoid undue advantage of Appellee's counsel. [R. p. 45.] Appellant objected orally to the continuances saying "he thought" Appellee had had ample time to obtain other evidence. [R. p. 67.] Counsel for Appellee stated he had relied upon the fact that he would receive an early ruling on the admissibility of the Reports. [R. pp. 40, 45.]

A. Diligence of the Appellee Prior to Trial.

Appellant argues: (1) That no diligence was shown on the part of Appellee in procuring evidence in time for the trial. He reasons that counsel for the Appellee had visited the scene within three weeks of the accident. (App. pp. 9, 11.) (2) That knowledge of the existence of the witnesses subsequently called by Appellee was available to her before trial. That witness, Dr. Arevalo was then known through the Autopsy Reports and the chauffeur, Cuevas, and Local Police Officer, Perez, were indicated in reports available and in the possession of the Appellee. (App. p. 12.) (3) That because Appellee found the witnesses between February 8th and 25th, that he could have found them prior to trial.

Answering his first argument: the assertion of lack of diligence is conjecture. There is nothing in the record in the nature of a detailed statement of Appellee's acts to obtain evidence prior to trial nor of the problems encountered in any investigation. Nor does it appear that Appellee was ever required to make such a showing. There are fragments of information in the record consistent, circumstantially, with the proposition that there was diligence. Counsel for Appellee stated at the trial that he had been to Mexico within "a couple of weeks" of the accident. [R. p. 45.] He also said he had encountered difficulties; that it was "very hard" for him to get any testimony out of Mexico [R. p. 40] , and similarly "Every time I try to get something in Mexico it takes so much longer than it does here * * *." [R. p. 66.]

The term "diligence" is a relative term, incapable of exact definition.

So holding:

Heintz v. Cooper, 104 Cal. 668, 38 Pac. 511;

Brannock v. Bromley, 30 Cal. App. 2d 516, 86 P. 2d 1062, 1066.

Answering the second argument: as to Dr. Arevalo; Appellee admits he was known but it was expected that his Autopsy Reports would cover any testimony the Doctor might give, prior to knowledge of a ruling on the documents. Since the Appellee ascertained the Reports would be held inadmissible on February 5th, it was a very short time in which to travel to Mexico on the hope of finding the Doctor and obtaining his deposition. [R. p. 40.] Appellant argues that the Autopsy Reports pointed out "witnesses," in the plural, to Appellant. (App. p. 12.) But, an examination of the Reports shows no mention of anyone other than the respective decedents and the signatures to the Reports. [Padre, Exs. B, C.] As to Cuevas and Perez: the only other report then known to Appellee was that of Federal Highway Officer, Luna-Ramirez, a witness for Appellant. The Luna-Ramirez report mentioned no other persons than the two persons who eventually died as a result of the accident, the two Hahns; and Mrs. Diaz. [Padre, Ex. A, pp. 1-3.]

As to Cuevas and Perez; the cross-examination of the Federal Highway Officer, Luna-Ramirez, on February 8th, indicated that one of the "rural police" in a car had notified him of the accident. [R. p. 53.] On February 17th, Appellee obtained a certified copy of a report of the Chief of Police of Mexicali, reciting that Patrol Car No. 1 had transported a Mrs. Montoya (Diaz) to the Mexicali Hospital from the scene of the accident. Likewise, a Buick car driven by Cuevas transported a minor, Eberto

Montoya (it was later learned that the identification in the report was in error. The minor was Herbert Huxley Hahn), "who had died on the way." [Padre, Ex. D, lines 10-24.] It may be reasonably inferred that the testimony of Appellant's witness, Luna-Ramirez, led to the rural police, through whom the Mexicali Police Department report was located, and which identified Cuevas and Local Officer, Perez of Patrol Car No. 1, as potential witnesses. But that was learned after the February 8th trial. The affidavit of Appellee's counsel shows that he learned on February 22nd from Cuevas that "a woman" was with Cuevas at the scene and that she, Ernestine Thomas, was not located until March 19th. [R. pp. 25-29.]

Answering his third argument: The fact that witnesses were ultimately produced does not establish the premise that a diligent search would have produced them at an earlier date. A diligent search may result in total failure. In the case of *In re Crater's Estate* (1939), 171 Misc. 732, 13 N. Y. S. 2d 597, the ultimate in diligent search was shown in the attempt to locate the missing Justice Crater of New York. The search was world wide, but it did not result in locating the jurist. If the justice were found in the future, it would be practically impossible to deem the search, reported in the case, as not diligent. At least there would be a complete record to argue from in the *Crater* case but here there is none.

In answer to Appellant's first argument, Appellee indicated that it was difficult to obtain testimony in Mexico. It may be noted that Cuevas testified that a watchman, for the parked cement mixer struck by the car of the decedents, was at the scene when he arrived and the record

is silent on an explanation why the watchman was not called as a witness by either party. [R. p. 79.] If it were an easy matter to locate witnesses Cuevas, Perez and Thomas, it would be reasonable to expect the Appellant to have called at least one of them. Appellee's counsel, as stated before, visited Mexicali shortly after the accident. Certainly an attorney who made that effort would not be likely to fritter away his time in a half hearted attempt to launch an investigation for his client.

The granting or refusal of a motion for continuance rests within the sound discretion of the trial judge, and his ruling will not be disturbed on appeal unless abuse of discretion is shown.

In accord and so holding:

Fidelity & Deposit Co. v. Bucki & Son Lumber Co., 189 U. S. 135, 143, 23 S. Ct. 582, 47 L. Ed. 744;

Girard Trust Co. v. Amsterdam (5 Cir., 1942), 128 F. 2d 376, 377;

Dietrich v. U. S. Shipping Board (2 Cir., 1925), 9 F. 2d 733.

At page 746 of the *Dietrich* case, it was held:

"The continuance of a pending action or its postponement is inherently in all courts, and is generally a matter resting in the Court's discretion, and reviewable only for abuse."

Also in accord with the point on discretion:

Harrah v. Morgenthau (1937), 67 App. D. C. 119, 89 F. 2d 863.

As shown above, the Court granted Appellee a continuance in the interest of justice after the Court believed it had misled counsel for the Appellee. The Court was

seeking to try the case on the merits and so stated: "We are not trying to determine these things on mere technicalities. We want to determine what the truth is if we can." [R. p. 45.] Such a ground is not an abuse of discretion.

B. The Continuance on the Court's Motion.

Appellant contends that Appellee made no claim that he was misled by the late ruling of the Court on the inadmissibility of the Autopsy Reports. But, that it was "injected" by the District Court on a supposition. (App. p. 12.)

From the context of the statements by the Court and counsel at the trial, it is clear that counsel referred to an expected early ruling on the documents when he said, "I had reliance upon that. Then it was impossible for me to get any witnesses up here from Mexico * * *." [R. p. 40.] Later counsel asked in the interest of justice to take the depositions of some witnesses down there and reported that he thought he would have sufficient time after the Court's ruling (on the Reports) to get needed evidence. [R. p. 45.]

Those statements by counsel clearly show he claimed to have been misled. His asking for leave to take depositions was substantially, but not technically perhaps, in the form of a motion to continue. The ground for the continuance rested on the Court's not wanting to take advantage of counsel. [R. p. 45.] Therefore, it was not necessary to investigate the other actions of the Appellee in preparing for trial as another ground for the continuance. The Court was interested in obtaining the true facts, so that the cause could be tried on the merits and not an technicalities. [R. pp. 45, 67.]

It is immaterial whether counsel formally made the motion or whether the Court continued the case on its own order.

The Court may order a continuance on its own motion.

Cases so holding:

City of Hialeah v. Harris (1936), 83 F. 2d 999;

State ex rel. Clark v. Bailey (1935), 99 Mont. 484, 44 P. 2d 740;

Matagorda Canal Co. v. Styles (Tex. Civ. App., 1918), 207 S. W. 562.

Specification I: The Continuance Granted February 25, 1954.

On February 25th, the trial having been set for March 1st, a hearing was held on Appellee's motion for continuance to March 15th. The supporting affidavit stated, among other things, that the depositions of Dr. Arevalo and two other eye-witnesses of the scene of the accident (Cuevas and Perez) were being sought, but that arrangements could not be made with reporters in sufficient time for the March 1st date; there being but two reporters in the area. Appellant orally opposed the motion at the hearing.

Appellant argues: that Appellee made no showing of diligence in seeking the depositions (App. p. 13); that affiant did not state when he went to Mexico (App. p. 13); that affiant did not recite the difficulties encountered in obtaining the depositions (App. p. 13); that the witnesses heard had been equally available to him prior to the February 8th trial (App. pp. 13, 14); that Appellant's witnesses could not be present on the continued date (App. p. 11).

In answer to Appellant's arguments: the motion of Appellee was timely; about a week before the trial date. If the Appellant deemed the affidavit insufficient, he had the opportunity to file counter-affidavits, which he did not do. There is nothing in the record concerning the arguments or replies given at the hearing on the motion. At the time of continuing the trial on February 8th, counsel for Appellee told the Court he did not believe that March 1st would allow him sufficient time to produce witnesses. [R. pp. 65, 66.] The Appellant is now referring back to a stale matter by seeking to reopen the hearing of February 25th in his Brief.

The argument that Appellee had shown no diligence in obtaining the continuance is without foundation as the contents of the affidavit manifest reasonable diligence. The Appellant admits in his brief that Appellee was diligent in the search for witnesses after February 8th.

> "* * * after February 8 and he (Appellee) applied the diligence to find witnesses that would have produced the same result had he done so before trial."

(App. p. 17.) The exact date was not required to be shown when counsel went to Mexico. It was before February 23rd, the date of the affidavit, and which was considerably before trial as then set. (The affidavit to re-open the case shows that Cuevas was first seen by counsel on February 17th in Mexico. [R. pp. 24, 25.]) As to "difficulties" left unexplained, the affiant used, strong general terms, "* * * affiant met with many objections on behalf of the Mexican Officials involved * * *." [R. p. 22.] If the Appellant wanted more precise language used or the exact time of affiant's trip to Mexico, he could have sought it through counter-affidavits. Ap-

pellee has already answered the argument that the witnesses concerned were available before February 8th, in the argument of the Continuance of February 8th. Appellant makes a statement in his brief that his witnesses could not be present at the March 15th hearing. (App. p. 11.) But, there is nothing in the record to indicate that he was unable to recall them at that time or any other time. Appellant concludes his brief asking for a new trial. (App. p. 25.) It now appears that the witnesses are available.

If Appellee had knowledge of the witnesses, Cuevas and Perez, which she did not, before the first session of the trial, her counsel would have, no doubt, been required to have been more meticulous in his affidavit supporting his motion concerning his search for them. But counsel did state a reasonably full narration of his finding them.

It was held in the case of:

Brannock v. Bromley, 30 Cal. App. 2d 516, 86 P. 2d 1062, 1066.

> "There is not hard and fast rule to the effect that each step taken by the moving party in searching for witnesses must be detailed in a meticulous manner, though admittedly it is better practice to specifically enumerate such facts."

In that case, a witness to an accident was found by plaintiff eight months after judgment had been given against him.

In Appellee's argument herein with respect to the Continuance of February 8th, points and authorities were given to the effect that continuances are within the discretion of the Court. They are therefore referred to at this time.

Specification I: The Motion to Reopen Granted April 8, 1954.

Following the trial of March 15th, the Court stated, "I will find * * * both were killed simultaneously." [R. p. 99.] No findings or conclusions were signed by the Court to that effect. It was an expression of an opinion.

In argument against the granting of the motion to reopen or for a new trial, Appellant says: (1) The evidence of Thomas' existence was as easily available to Appellee after January 11th as it was after the March 15th trial. (App. p. 17.) (2) The Appellee switched the theory of the case after February 8th and then applied diligence to find witnesses. (App. p. 17.) (3) The diligence to locate Thomas was after the trial and not before. (App. p. 14.) (4) To qualify for re-opening, the newly discovered evidence was required to meet the test of evidence upon which to base a motion for new trial. (App. p. 16.) (5) The testimony of Thomas was cumulative of that offered by Cuevas. (App. p. 17.)

In answer to the first point: Appellee has already argued the diligence of Appellee to find witnesses under the Continuance Granted February 8th. The testimony of Appellant's witness, Luna-Ramirez, pointed toward the Rural Police having been associated with the accident. That in turn led to the Mexicali local police and through them to the discovery of Cuevas. Finally Cuevas told counsel on February 22nd of "a woman" who had ridden with him in her Buick to the scene of the accident and during the ride to the hospital with the boy. But had moved from her Tijuana address and it was said that she moved "to the United States." But she was thought married to a

man named Thomas, whether first or surname. On the same day after leaving her old residence, counsel called at the police station and also at the United States Immigration authorities without success in locating her. Finally, on the way to the trial of March 15th, Cuevas reported he had learned her first name and that she was living in the San Diego area. After employing investigators in the area, a search of the shipyards resulted in locating her husband and eventually her on March 19th. [R. pp. 25-27.] No part of the chain of information was known to Appellee until the dates stated. And it wasn't "easily discovered."

As to the second argument: Appellee did not change the theory of her case as one might in shifting from one legal theory in an action to another. At the first trial session she depended on the Autopsy Reports and the Death Certificates because they were all she had been able to procure in a foreign country and a considerable distance from her counsel's office. When the slender hope of finding eye-witnesses was found on February 8th, success followed. Appellee did not gamble on the theory of relying only upon documents. The case of *Rue v. Feutz Construction Co.,* 103 Fed. Supp. 499, cited by Appellant, is not in point. The party seeking to reopen, sought to use testimony of persons whose knowledge of the facts were known to it throughout and even before the trial. At page 502 the Court held: "Indeed the parties from whom additional evidence would be elicited are persons who are and have been readily available to the garnishee."

On the third argument: Appellee has already presented argument why the search for witnesses, whomever they might eventually have been, was conducted after the session of February 8th.

In answering the fourth argument: Appellee contends that the testimony of Thomas met all of the tests which would have been required for granting a motion for a new trial on the ground of newly discovered evidence.

In reply to the argument that the tests applied to newly discovered evidence for a new trial should be applied to Thomas' evidence on the motion to re-open, Appellee maintains that it is not definitely established by the cases and furthermore, that it was within the discretion of the Court to grant the motion. One of the tests is that it be newly discovered since the trial. That is reasonable.

In support of Appellant's argument requiring the new trial tests, he cites:

6 *Moore's Federal Practice* (2d Ed.) 3723. (App. p. 16.) Appellant recites five tests for newly discovered evidence for new trial as given in the case of:

> *Marshall's U. S. Auto Supply v. Clampett* (10 Cir.), 111 Fed. 2d 140.

That the evidence be newly discovered since the trial; there must be a showing of facts that there was reasonable diligence in trying to procure the evidence prior to trial; it must not be cumulative; it must be material; and there must be a showing that a different result will probably be reached.

The *Marshall* case cites its authority as:

> *Prisament v. United States* (5 Cir.), 96 F. 2d 865.

In turn the *Prisament* case cites:

> *Johnson v. United States* (8 Cir.), 32 Fed. 2d 127.

It was held in the *Johnson* case at page 130, on the tests for evidence for a new trial: "There must ordinarily be

present and concur five verities, to wit: * * *"; then follow the tests. The term "ordinarily" evidently refers to lattitude given for the Court's discretion.

Moore's statement, referred to by Appellant, is to the effect, that after an opinion has been expressed by a judge, a motion to take additional testimony closely approaches that of a motion for new trial on the ground of newly discovered evidence. Just how closely it approaches is not explained in detail. The cases cited by Moore in support of the statement, speak only of "newly discovered evidence." They do not mention the other four tests. If at all, those four tests can only be included by inference. In the case of *United States v. Colangelo* (E. D., N. Y., 1939), 27 Fed. Supp. 921, only an opinion had been rendered and the Court gave plaintiff the benefit of the doubt as to having newly discovered evidence in re-opening.

In the case of *Blytheville Cotton Oil Co. v. Kurn* (6 Cir., 1946), 155 Fed. 2d 467, 470, it was held that the motion to re-open was equivalent to a new trial. But there a judgment had been entered. The motion was not based upon evidence which appeared to be newly discovered. Under those facts, it is not authority for Moore's statement which refers to re-opening after only an opinion has been given.

It was held in the case of *Patterson v. National Life etc. Co.* (6 Cir., 1950), 183 Fed. 2d 745, 747,

> "In the present case, appellant's request was not made until after the District Court had given its oral ruling on a factual issue involved. It was not newly discovered evidence."

It would appear that the Courts do not require the more strict tests required for a new trial in the case of a re-opening after an opinion has been expressed. The former situation asks that the whole case or part of it be retried; certainly a major effort and the undoing of a great deal. But, merely adding to evidence already well in the mind of the Court entails a relatively small effort on the part of the Court and the litigants, and is accomplished with relative dispatch.

A motion to re-open is normally addressed to the discretion of the trial court. In accord and so holding:

> *Skinner Mfg. Co. v. Kellogg Sales Co.* (8 Cir., 1944), 143 F. 2d 895, 900, Cert. Den. (1944) 323 U. S. 766;
>
> *Gas Ridge v. Suburban Agric. Products* (5 Cir., 1945), 150 F. 2d 1020, Cert. Den. (1946) 326 U. S. 796;
>
> *Patterson v. National Life etc. Co.* (6 Cir., 1950), 183 F. 2d 745, 747.

The discretionary denial or grant of the motion will not be interfered with by an appellate court unless abuse of discretion has been shown, whether the action be tried by the Court or jury.

Gile v. Duke (9 Cir., 1925), 5 F. 2d 952, 953, and *Skinner Mfg. Co.* and *Gas Ridge* cases, immediately above.

Moore concludes his on re-opening in general by stating:

> "A district court, then, should consider a motion to reopen to take additional testimony in light of all the surrounding circumstances and grant or deny it in the interest of fairness and substantial justice. If the grant or denial involves an exercise of discretion

by the trial court; and because this court has a feel for the case that an appellate court can seldom have, the trial court's ruling is subject to reversal only in a rare case where abuse is clearly shown."

6 Moore's Federal Practice, 2d Ed. 3728.

Moore, at page 3722, states that the motion to re-open does not rest on Section 59a of the Federal Rules of Procedure.

As to discovery since the trial: The exact time of discovery of Thomas' knowledge of the matter was on March 20th, when council first talked to her. [R. pp. 28, 29.]

In answering the third argument on this point of re-opening, Appellee has already covered the affidavit of Appellee's counsel which supported the motion and has shown diligence therein. The Appellee's reply to the first point on the motion to re-open outlines the steps taken to locate Thomas as indicated in the affidavit of counsel. [R. pp. 25-27.] There is no doubt that the evidence was material. Thomas added the evidence which established almost the exact time when Herbert Hahn died in her car en route to the hospital and she also testified that Y. D. Hahn had died prior to the boy. As to the affidavit of Thomas being sufficient to show that a different result would probably be reached if her testimony were heard, it was reasonably stated in detail of her observations. [R. pp. 28, 29], and which was repeated in her testimony. That testimony coming when the evidence was in balance, might reasonably be assumed to tip the weight in a new direction; and it did.

As to its being cumulative and in answer to Appellant's fifth point: Thomas' testimony is reflected in the findings

as to the time of death of Herbert Hahn. [R. p. 31.] She had the only opportunity, of all the witnesses on either side, to observe the death. Therefore, her testimony is not cumulative. Not only did her evidence tip the weight of evidence in Appellee's favor, but her testimony gave greater weight to that of Cuevas than had been given to it at the March 15th session. [R. pp. 170, 173, 175, 179.]

Her testimony corroborated Cuevas on several points, it is true, but she went beyond his testimony when she established the precise time of death. She observed the boy under different circumstances than the other witnesses. They observed the boy at the scene of the accident and they carried him for a short way. Whereas she observed him during a half hour ride in her car by touching his body. She presented a new specific fact, another ground for establishing the death. [Padre, Ex. G, p. 13, line 25, to p. 15, line 3.]

It was held in the case of *Waller v. Groves,* 20 Conn. 305,

> "But that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim insisted on, is not cumulative within the meaning of the rule on this subject; * * *."

That was a case of libel and was cited with approval in *State v. Evans* (1920), 98 Ore. 214, 192 Pac. 1062, 1067. Of the same accord, *Brown v. Graham,* 62 Idaho 388, 112 P. 2d 485.

California analyzes the purpose of the test regarding cumulative evidence. It ties it to the test of probability of a different result and the question of "cumulative" is subordinate to it.

Oberlander v. Fixen Co., 129 Cal. 690, 62 Pac. 254, 257, holds at page 257:

> "Hence the rule, so often reiterated by the courts, that a new trial should not be granted where the evidence is merely cumulative, must be regarded (in this state), not as an independent rule, additional to those established by the provisions of section 657 of the Code of Civil Procedure, but as 'a mere application of those rules, or as it has been expressed, as corollary of the requirement that newly discovered evidence must be such as to render a different result probable on a re-trial of the case.' Hayne, New Trial, pp. 255-6."

Thus if the evidence is sufficient to probably change the results, its cumulative character will not permit its being the basis for a new trial. Perhaps, very often, cumulative evidence would not produce a new result.

Appellee has shown the tests of the *Marshall U. S. Supply* case are subject to variation, and since the motion to re-open was discretionary with the Court, in any event, the motion should stand since no abuse of discretion was proved.

Appellant's Claim of Having Been Denied an Orderly Trial.

Appellant contends, that together, the two continuances and the re-opening of the trial denied him an orderly trial. (App. p. 10.) He presents the following arguments: (1) It resulted in an advantage to Appellee by permitting Appellee to meet the issues (of fact?) piecemeal as they arose. (App. pp. 12, 19.) (2) The judge's recollection of testimony of Appellant's earlier witnesses may have been blurred by the passage of time and gave

witnesses, who were heard later greater weight in the judge's weighing of the evidence. (App. p. 20.) (3) Appellant was at a disadvantage in not being able to present his witnesses in rebuttal. (App. p. 11.)

In answer to the above arguments, Appellee contends:

As to the first point: In the preceding argument by Appellee, it has been shown that each continuance and the re-opening were on a sound basis and the discretion of the Court was not abused in granting them. There was only one basic issue of fact in the case: the order of deaths of the two persons. Appellee has also shown and argued that her witnesses, Cuevas and Perez were sought immediately after the February 8th session; also that the search for Thomas was begun before the March 15th session, but she was not found until later. There was no holding back of witnesses nor looking for them, depending upon developments at the trial.

Appellant requested that his witnesses, Luna-Ramirez and Bello, be heard on February 8th after knowing of the continued date. He could have held them for the March trial; they would then have been on hand to rebut testimony, if required.

As to the second argument: At the first two sessions the greatest part of the evidence was heard on both sides. (App. p. 4.) The several weeks between those sessions were not an unduly long period for the judge to remember the evidence. At the end of the second session, the evidence was evenly balanced as of that time. [R. 98, 99.] It was a completed phase in which Cuevas' testimony largely balanced the evidence of the Appellant. Cuevas testified to being told by the Appellant's witnesses to take the boy to the hospital. It was striking evidence to con-

tradict testimony that the boy had died at the scene of the accident. [R. p. 83.] The period of time at which Thomas' testimony would follow the first phase was not important because any weight to strengthen Cuevas' testimony or to add new evidence, would tip the balance. The potential weakness of Appellant's evidence was noted in the first phase. [R. pp. 170, 171, 173, 175, 179.] The total lapsed time of six months for the three trial sessions could not reasonably fade the judge's memory or upset his sense of values in appraising evidence.

Appellants cited the case of *The Plow City* (3 Cir.), 122 F. 2d 816, as comparable to this case, to support his contention of abuse of discretion. The total period of the trial extended for nine months and all of the witnesses, on both sides, were available throughout. The adjournments were not sought by counsel but by the Court; page 819, of the reported case. Contrary to that case, the instant case on appeal herein has shown that Appellee's witnesses were not available and the Court made but one continuance on its own motion. Appellant's quotation on page 15 of his Brief appears to be quoted from a headnote. His last sentence appears to be complete, but that does not agree with the report of the case. At page 819 it holds:

> "Public policy demands that, in the interest of prompt and efficient administration of justice, a trial once entered upon should be proceeded with from day to day until it is concluded, unless the exigencies of the cause or the public interest imperatively require a reasonable adjournment."

Thus the *Plow City* case holds that exigencies are to be considered. Appellee contends that those exigencies existed in the case now on appeal.

As to the third argument: the record does not show anything to indicate that Appellant's witnesses were not available for rebuttal. And as already argued, he now asks for a new trial, indicating, inferentially, that they are now available. At the re-opened session Appellant presented the testimony of Ritchy to counter that of Thomas. [R. pp. 161-167.]

Appellant has failed to show that his case was prejudiced or placed at a disadvantage by the conduct of the trial, or that there has been an abuse of discretion. The entire Specification of Error I, should therefore be rejected.

Specification II: The Findings of Fact as Supported by the Evidence.

Appellant has specified that the District Court erred in making the finding that Herbert Huxley Hahn survived Y. D. Hahn, in that it is not supported by the evidence.

Appellee contends that not only is there substantial evidence to support the Court's Findings, but it is clear and convincing.

A summary of Appellee's evidence shows:

As to witness Cuevas' testimony: He and Ernestine Thomas, riding in the same auto, arrived at the scene of the accident about 11:45 P. M., Saturday, April 18, 1953, before any police arrived. A watchman for the cement mixer involved in the accident, was there when they arrived. [R. pp. 77, 81, 86.] Cuevas observed that Y. D. Hahn was already dead, in the wrecked car, and the injured Mrs. Diaz was lying in the road. [R. pp. 79, 80.] One of the Federal Highway Officers later handed

the boy, Herbert, to Cuevas to be placed in the car Cuevas was driving. [R. p. 83.] While carrying the boy, Cuevas observed the boy was making sounds as though injured and his body was warm. [R. p. 82.] The Federal Highway Officer told Cuevas to drive the boy to the hospital. [R. p. 83.] During the half hour ride to the Mexicali Hospital, Mrs. Thomas sat in the front seat, reaching over to hold the boy in the rear seat. At the hospital, one of the Local Police Officers who had been at the accident, took the boy from the car. [R. p. 84.] Cuevas also gave information of the accident to that officer at that time. [R. pp. 87, 88.] At the scene of the accident, the car of the Federal Highway Officers arrived first, then Local Police Car No. 1. He followed the latter car when he drove from the scene. [R. p. 83.] Cuevas saw no ambulance at any time. [R. p. 94.] The Local Police Car carried Mrs. Diaz to the hospital. [R. p. 83.]

As to witness Thomas' testimony: the witness testified through an interpreter. She stated that she had hired Cuevas to drive her car from Tijuana to Mexicali on the evening of April 18th. [Padre, Ex. G, p. 3, lines 8-19.] The consensus of her statements as to the time of arrival at the scene was about 11:45 P. M. [Padre, Ex. G, p. 4, line 24; p. 17, lines 20-22; p. 19, line 25; p. 38, line 21.] At the scene of the accident she observed Y. D. Hahn was seated in the front seat of the wrecked car and that he was not breathing. [Padre, Ex. G, p. 6, lines 19-21; p. 7, lines 5-15.] She saw Mrs. Diaz lying on the pavement. Thomas said she was very nervous at the scene. [Padre, Ex. G, p. 8, lines 20-22; p. 10, lines 12-14.] She saw the officer pick up the boy and turn the child over to Cuevas, who put the boy on the rear seat of her car. [Padre Ex. G, p. 9, line 23, to p. 10, line

4.] She was told by an officer to follow a police car to the hospital and her car followed as directed. [Padre, Ex. G, pp. 13, 10-18.] At the time when the boy was handed to Cuevas, she could hear the boy breathing. [Padre, Ex. G, p. 13, lines 1-8.] While on the way to the hospital, she was seated in the front seat and turned around to hold the boy with her hand. She could feel his heart beat when she put her hand on his chest and could feel him breath. He was dead when they arrived at the hospital. [Padre, Ex. G, p. 13, line 25, to p. 15, line 3.] She observed that the boy's heart stopped about ten minutes before they arrived at the hospital. [Padre, Ex. G, p. 15, lines 14-21.]

At the hospital, she heard someone say there was no ambulance; that it was broken, and later she heard over the radio that it was broken. [Padre, Ex. G, p. 33, line 21, to p. 34, line 23.]

As to the testimony of Dr. Arevalo: the Doctor had seen the bodies of Y. D. Hahn and Herbert Hahn on April 19th. [R. pp. 101, 102.] He dated his Autopsy Reports of the two decedents on April 22nd. In his opinion, according to his report, Y. D. Hahn died at 20 hours (8 P. M.), April 19, and Herbert died at 23 hours (11 P. M.), the same day. [R. pp. 106, 117.] The death of the latter occurred a few hours before the autopsy. [R. p. 119.] (There was considerable examination and cross-examination of the Doctor as to the dates when he examined the bodies and when he made and signed his reports. There was some confusion in his testimony as to the dates.) The Doctor testified the wounds of Y. D. Hahn were more severe than the boy's. The former's hemorrhage was bigger than the boy's and Y. D. Hahn

had a big, open head wound; the boy had no open head wound. [R. pp. 122-123.]

As to the testimony of witness Perez: he was the Chief Officer of the Department of Patrol of the Mexicali Police Department, but a corporal at the time of the accident. [R. p. 139.] He was riding with Officer Beltran at the time he heard of the accident. [R. p. 140.] He had seen the Federal Highway Officers' car, the only car, at the accident. [R. p. 141.] He saw Y. D. Hahn in the wrecked car and he drove Mrs. Diaz to the hospital. [R. pp. 141-142.] He first saw the boy, then dead at the hospital. [R. p. 142.] At the hospital, he took the name and address of Cuevas that carried the boy to the hospital. [R. pp. 143-148.] He testified a woman was in the car driven by Cuevas. [R. p. 148.] He had made a report of the accident at his Police Department. [R. pp. 146-148.]

As to Padre Exhibit "D": the certified copy of the report on the accident in the files of the Mexicali Police Department was admitted into evidence. It corroborated Officer Perez, that his Patrol Car No. 1 transported the injured Mrs. Diaz and that the Buick, driven by Cuevas, transported the boy to the hospital and "who died on the way." [Padre, Ex. D, lines 10-24.]

Appellee's evidence also included the Autopsy Reports on Y. D. Hahn and Herbert Hahn [Padre, Exs. B, C], as well as certified copies of death for each. [R. p. 73.]

Appellant argues that the above evidence was not sufficient to establish the order of deaths. He relies upon the conflicts in evidence to support his position. His attack consists of an attempt to show that Cuevas and Thomas were not at the scene of the accident, because

his witnesses, Luna-Ramirez and Bello, the Federal Highway Officers, and Perez testified they did not see them at the accident. He brushes off Cuevas' testimony by saying little weight had been given to it by the Court at the March 15th session of the trial. (App. p. 22.) However, the Court stated the case was in balance on that date and he couldn't determine the order of deaths without some corroboration of Cuevas' testimony. [R. p. 173.] Cuevas must have had considerable weight in order to counterbalance that of both of Appellant's witnesses.

Appellant argues chiefly against the testimony of Thomas. He seeks to minimize her testimony by saying it was not clear whether she learned the boy was present at the scene 15 or 45 minutes after she arrived there (App. p. 23); that she was confused on the exact time of her arrival at the scene (App. p. 7); that she was confused as to the time the police cars arrived. (App. p. 7.) Appellant argues that the statements by the officers nullify any testimony by Thomas that she rode in the car with the boy to the hospital; their statements being that they did not see her at the scene of the accident. Officer Perez testified he did not see Federal Highway Officer Bello at the scene. Thus his observations as to the persons present was not perfect. [R. p. 142.]

Appellant's witness, Ritchy, a San Diego Police Officer, who talked to Mrs. Thomas, testified that she told him the police officers were at the scene before she arrived. (App. p. 23.) Appellee draws the Court's attention to her testimony absolutely denying she made the statement to Ritchy. [Padre Ex. G, p. 25, lines 7-14; p. 37, lines 7-16.] It will be noted that Ritchy testified that she said the boy was alive at the scene and that he died en route

to the hospital. Also, that Y. D. Hahn was dead at the scene. [R. pp. 164-166.] The trial court stated that Ritchy corroborated Thomas on those points and that, otherwise, he couldn't place much weight upon the testimony of Ritchy acting as a special investigator. [R. pp. 171, 172.] In Appellant's Brief, in the last four lines of page 23, he states first, that Thomas testified to putting her hand on the boy and felt his heart beat. Then he says she told Ritchy the opposite. The latter statement is incorrect as Ritchy's testimony shows. He stated she told him that she kept one hand on the boy's body to keep him from rolling. [R. p. 164.]

The details at the scene, which Appellant maintains she did not state convincingly, are minor ones in determining whether she was at the scene of the accident or not. The very important and major point is that the Mexicali Police Department record established her at the scene and in transporting the boy to the hospital. Perez' testimony supports the same facts. That is independent and impartial evidence, firmly establishing them on the scene.

Mrs. Thomas may not have been fully accurate on the minor matters. She stated she was very nervous at the time. [Padre Ex. G, p. 8, lines 20-22; p. 10, lines 12-14.] She had no watch with her that evening. [Padre Ex. G, p. 16, lines 3-4.] Also, she had been ill during that time. [Padre Ex. G, p. 19, lines 20-22; R. p. 83.]

Appellant also states in his Brief that Thomas testified that the boy had been placed in her arms by the officers at the scene. (App. p. 23.) That too is incorrect. It is not found in her testimony and the only evidence in the record is that Cuevas received the boy.

Dr. Arevalo's Autopsy Reports did show the order of deaths, but it would appear that Herbert Hahn was not

the survivor by as long as three hours. The fact that Y. D. Hahn was more seriously injured makes it more reasonable that he died first.

Appellant's witnesses are to be doubted, Luna-Ramirez referred to an ambulance which allegedly came to transport the three victims from the scene. [R. p. 50.] Bello indicated that there were more than one ambulance involved. [R. p. 63.] Appellee's witness, Perez, and of course Cuevas and Thomas showed that they carried the injured Mrs. Diaz in the Local Police car No. 1 and the boy in the Buick. The Mexicali Police record corroborates them. [Padre Ex. D.] Thomas testified that she heard at the hospital and later over the radio, that the ambulance at Mexicali was broken. Although it was hearsay, it was not objected to. Considering the size of Mexicali, it is reasonable to believe that it was the only ambulance there.

As to the death of Y. D. Hahn, Appellant's witnesses agree that he was dead before the boy was taken from the scene of the accident. Cuevas and Thomas stated he was dead when they arrived.

The half hour ride with the boy to the hospital allowed Thomas the greatest opportunity of all the witnesses to observe the condition of the boy. Her attention was concentrated upon him during that period. Undoubtedly, the observation of the boy by the officers at the scene was cursory.

The trial court was of the opinion that Cuevas and Thomas were disinterested witnesses. "Neither this witness Cuevas nor this woman so far as I know, have any interest in this case whatsoever. At least there is no indication that they have any interest. They are about,

you might say, they are about the only disinterested witnesses that we have had." [R. p. 172.] The Judge summarized his view of the evidence at the close of the trial:

> "The Court: There are three points in this case as far as I am concerned. One is that the child was taken to the hospital; the man was taken to the morgue. That is almost sufficient in itself. I probably was leaning too strongly against Mr. Templeton's client when I didn't give too much weight or give the weight it was probably entitled to of the taxicab driver's testimony, but when they brought in this other witness I don't see how you can get away from it, counsel." [R. p. 179.]

The foregoing statement of Appellee's evidence qualifies it as sufficient evidence to sustain the Findings of Fact.

Section 296.3 of the Probate Code of California applies to insurance policies, in simultaneous death cases. The provisions do not apply if sufficient evidence as to the order of deaths is available. The case of:

> *Azvedo v. Benevolent Society of California* (1954), 125 Cal. App. 2d 894, 900,

holds as follows:

> "The cases cited also hold with remarkable uniformity that if there is any sufficient evidence that either party survived the other, even when the deaths occur at substantially the same time, the statute (Sec. 296.3) is inapplicable and the question of survivorship must be determined as any other fact. No case has been found indicating that mere difficulty in determining which one survived justifies the court in

abandoning the task and seek shelter under the protecting arms of the simultaneous death statute."

The above case cites with approval the case of:

Estate of DiBella (1950), 100 N. Y. S. 2d 763, affd. 107 N. Y. S. 2d 929.

In that case it was held that an interval of one second between the deaths would render a similar section inoperative.

Under the California law, the Estate of Herbert Huxley Hahn is entitled to the proceeds of the insurance policies as he survived Y. D. Hahn, the beneficiary.

Argument as to Disturbing the Findings of Fact.

Appellant argues that since three of the four witnesses presented by Appellee (there were five) testified through depositions, the Court of Appeals is in as good a position to judge the credibility of Appellee's evidence as the trial court. He also minimizes the weight of eye-witness Cuevas, who appeared in court as a witness.

Appellee has already contended and shown that the trial court gave considerable weight to Cuevas testimony. Further, the conflict in the evidence at the March 15th session of the trial was represented on Appellant's side by the testimony in court in Luna-Ramirez and Bello. The credibility of those two witnesses was materially before the Court at all times, as was that of Cuevas. Therefore, the Court of Appeals does not have the advantage which the trial court had in judging their credibility. This is not a situation where the cause was largely determined by deposition.

Appellant cites the case of:

Equitable Life Insurance Co. v. Irelan (9 Cir.), 123 F. 2d 462.

According to the holding quoted at page 21 of his Brief, the evidence in the case of appeal is binding on the Appellate Court. There was considerable contradictory evidence and it was not all by deposition. The credibility of witnesses on both sides was involved.

Appellee has shown that the evidence supporting the Findings was substantial or sufficient, the terms being synonymous. Under these facts, the Findings should not be disturbed on appeal.

Rule 52a of the Federal Rules of Civil Procedure provides that findings shall not be set aside unless clearly erroneous.

The following cases construe that section:

It was held in:

Bjornson v. Alaska S.S. Co. (9 Cir., 1951), 193 F. 2d 433,

at page 433:

> "And it does not mean (Rule 52a) that the reviewing court shall determine from the record where the weight of the evidence lies. It is not clearly erroneous for the trial court to choose between two permissible but conflicting views as to the weight of the evidence. United States v. Yellow Cab Co., 338 U. S. 338, 342, 70 S. Ct. 177, 94 L. Ed. 150. A finding supported by substantial evidence may be said to be 'clearly erroneous' if the reviewing court, after consideration of all the pertinent evidence, has a 'definite and firm conviction that a mistake has been committed.' "

Citing:

United States v. U. S. Gypsum Co., 333 U. S. 364, 394.

It was held in:

Shapiro v. Rubens (7 Cir., 1948), 166 F. 2d 659, 666,

at page 666:

"* * * but we will not disturb findings unless they cannot be sustained upon any rational view of all of the evidence including all reasonable inferences of which the testimony is susceptible * * *."

The case of

Occidental Life Insurance Co. v. Thomas (9 Cir., 1939), 107 F. 2d 876,

holds that the Appellate Court may not weigh the evidence but must accept the findings unless no reasonable man could draw such conclusions from the evidence.

Also construing Rules 52a, the following case urges restraint by the Appellate Court in disturbing findings.

Jacuzzi Bros. Inc. v. Berkeley Pump Co. (9 Cir., 1951), 191 F. 2d 632.

In the case of:

Colusa Remedy Co. v. United States (8 Cir., 1949), 176 F. 2d 554,

it was held at page 557:

"* * * where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless obvious error of law has intervened, or some mistake of fact has been made, the finding or decree must be permitted to stand."

Conclusion.

It is submitted on the basis of the conduct of the trial court in granting two continuances and in granting the motion to re-open the case, that the ends of justice and public policy were met in trying the case upon its merits as presented by the facts, rather than bending toward any superficial technicalities. The Appellee had a difficult task to procure evidence in a foreign country and her diligence to obtain the necessary evidence was shown. The trial court exercised its discretionary powers without abuse and without any injury or prejudice to the procedural or substantive rights of the Appellant. Since the Appellee's action was based upon adequate findings supported by sufficient evidence, it is respectfully submitted that the Specifications for Error relied upon be rejected; that a new trial be denied Appellant; that the findings be undisturbed and the judgment appealed from be affirmed.

Respectfully submitted,

TEMPLETON & MILLER,

HARRY E. TEMPLETON,

Attorneys for Appellee, Sarah E. Padre, as Administratrix of the Estate of Herbert Huxley Hahn, Deceased.